

3. NATURAL RESOURCES

3.1 Introduction

3.1.1 Background

For the purpose of real property transfers, there are four primary kinds of natural resources to consider:

- (1) Habitats of endangered and threatened species,
- (2) Environments of migratory birds,
- (3) Wild and Scenic Rivers Act designated areas, and
- (4) Other environmentally sensitive natural resource areas.

Other environmentally sensitive natural resource areas are exemplified by pristine wilderness areas, areas with species-rich ecosystems, and ecosystem sanctuaries. Natural resources that play a role in the traditional religious practices of Native Americans, such as geological formations or vistas that are regarded as sacred, are covered in Chapter 4. Natural resources that comprise the traditional subsistence of Native Americans are covered in Chapter 5. Natural resources (such as marine mammal sanctuaries, prime agricultural lands, tundra, coral reefs, and tropical rain forests) not found widespread on DOE lands are excluded from further discussion.

The most sensitive of the aforementioned types of natural resources is habitat of endangered and threatened species (see text box). Protection of such habitats is vital for reversing the decline of those species. In the U.S., nearly 600 plant and animal species are listed as endangered or threatened; another 4,000 species are candidates for listing. Protecting plant and animal species from extinction is essential to maintaining biological diversity and functional integrity in the perpetuation of ecosystems. Each plant or animal plays an integral role in the hydrologic, carbon, and nutrient cycles of an ecosystem. Healthy ecosystems are necessary to support fish and wildlife populations important for commercial, economic, recreational,

Endangered and Threatened Species on DOE Facilities

DOE sites serve as stewards of numerous threatened and endangered species. Examples of such species include the red cockaded woodpecker, golden eagle, and smooth purple coneflower. DOE's role as stewards involves not only protecting but also improving the habitats for these species. One animal species whose population is recovering due to such efforts is the San Joaquin kit fox, a Federally listed endangered species, at Naval Petroleum Reserve Number 1, Elk Hills, California.

esthetic, ethical, and even cultural values. Maintaining a diversity of species and genetic strains provides a gene pool for potential use in agriculture, medicine, and industry (such as pulp and paper).

Another important habitat is that of migratory birds. The most common examples of migratory birds are ducks, geese, and swans. Destruction of nesting cover and degradation of migration and wintering habitats have contributed to long-term downward trends in populations of migratory species, such as pintails, American bitterns, and black ducks. Protection of such environments is necessary to allow breeding, wintering, or stopping over along migration routes in order to achieve and maintain optimum bird population levels. Congress amended the Migratory Bird Treaty Act in 1974 to add migratory bird environments to the items protected under the original 1918 Act. (This Act originally included only the birds and their nests and eggs).

The third type of natural resource is areas designated as wild and scenic rivers. The Wild and Scenic Rivers Act was passed in 1968 to protect certain selected river areas because of their "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or

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similar values." There are three kinds of Wild and Scenic Rivers Act designated areas:

- (1) Wild river areas,
- (2) Scenic river areas, and
- (3) Recreational river areas.

Wild river areas are sections of a river that are free of impoundments and generally inaccessible except by trail, with essentially primitive watersheds or shorelines and unpolluted waters. Wild river areas represent vestiges of primitive America. Scenic river areas are sections of rivers that are free of impoundments, with shorelines or watershed largely undeveloped and accessible by roads. Recreational river areas are sections of rivers that are readily accessible by road, may have some development, and may have undergone impoundment or diversion in the past.

The fourth type of natural resource covers a miscellany of areas not addressed above that are also environmentally sensitive. These are areas that are unique or substantially different from their surroundings in terms of:

- Vegetation,
- Terrain,
- Soils,
- Water availability, or
- Other factors that may be ecologically critical (i.e., a large number of species may be adversely affected by a disturbance).

These areas are particularly species-rich or sensitive to nutrient enrichment. Examples of such areas other than wetlands (already discussed in Chapter 2) are shown in Exhibit 3-1.

3.1.2 Definitions and Their Implications

The term "habitats of endangered and threatened" species includes and is broader than the regulatory term critical habitat. Critical habitats [Endangered Species Act (ESA) § 3(5)] are areas with physical or biological features that:

- (1) Are essential to the conservation of an endangered or threatened species, and

- (2) Require special management considerations or protection.

Exhibit 3-1. Examples of Other Environmentally Sensitive Natural Resources

- Ecosystem sanctuaries
- National Environmental Research Parks (NERPs) (see Section 3.3.4)
- Pristine Wilderness areas
- Special sources of water
 - Sole-source aquifers
 - Wellhead protection areas
- Species-rich ecosystems

Critical habitats are designated in 50 CFR Parts 17 or 226. Furthermore, ESA § 7(a)(4) requires consideration of impacts on species proposed for listing and their habitats (so-called proposed critical habitats). In addition, DOE NEPA implementing regulations (10 CFR 1021, Subpart D, Appendix B) require that the same considerations for Federally-listed endangered and threatened species be given for State-listed endangered and threatened species (State-proposed endangered and threatened species are not included). Thus, the term "habitats of endangered and threatened species" is used in this guidance document to encompass habitats of Federally-listed species, species proposed for Federal listing, and State-listed species.

3.2 Drivers for the Requirements

There are four statutes that ascribe a role for the consideration of natural resources in real property transfers: ESA, the Migratory Bird Treaty Act, the North American Wetlands Conservation Act, and the Wild and Scenic Rivers Act. In addition, several international treaties, to which the U.S. is a signatory, are also drivers: the 1916 and 1936 Migratory Bird Conventions, the Convention on Nature Protection and Wildlife Preservation in the Northern Hemisphere, and the North American Waterfowl Management Plan. DOE NEPA implementing regulations (10 CFR 1021, Subpart D, Appendix B) are also a driver because they list the particular environmentally sensitive natural

resources that must be taken into account in an environmental review.

3.3 Requirements for Real Property Transfers

3.3.1 *Habitats of Endangered and Threatened Species*

Section 7(a)(2) of ESA requires every Federal agency to consult with the Secretary of the Interior (delegated to Regional Directors of U.S. Fish and Wildlife Service) regarding any Federal action to ensure that the action does not:

- (1) Jeopardize the continued existence of any species **listed** (as endangered or threatened), or
- (2) Adversely modify a critical habitat.

Likewise, Section 7(a)(4) of ESA requires similar consultation when the action involves a species **proposed** for listing (as endangered or threatened). In addition, DOE NEPA implementing regulations (10 CFR 1021, Subpart D, Appendix B) require that the same considerations for Federally-listed endangered and threatened species be given for State-listed endangered and threatened species. (State-proposed endangered and threatened species are not included).

3.3.2 *Environments of Migratory Birds*

Section 9 of the North American Wetlands Conservation Act requires every Federal agency to cooperate with the Director of the U.S. Fish and Wildlife Service in protecting habitats for migratory birds within the lands and waters of each such agency.

3.3.3 *Wild and Scenic Rivers Act Designated Areas*

Section 8(a) of the statute withdraws all public domain land within Wild and Scenic Rivers Act designated areas (listed in § 3 of the Act) from sale or other disposition except for leasing and exchange. Section 8(b) of the statute withdraws from sale or other disposition all public domain land that:

- (1) Constitutes the bed of or bank of, or
- (2) Lies within one-quarter mile of the bank of

any river listed as a potential addition to the Wild and Scenic Rivers Act designated areas (listed in § 5 of the Act).

3.3.4 *Other Environmentally Sensitive Natural Resources*

Other environmentally sensitive natural resources are listed in 10 CFR 1021, Subpart D, Appendix B. If a real property transfer with use changed adversely affects an environmentally sensitive natural resource, 10 CFR 1021, Subpart D, Appendix B requires an environmental assessment, at the minimum, as the level of NEPA review. (See Chapter 13 on the implementation of the NEPA review requirement and preparation of environmental assessments.)

This is exemplified by the seven national laboratories designated as National Environmental Research Parks (NERP). The NERP system was initiated by DOE's predecessor, the U.S. Energy Research and Development Administration, in order to establish a system of ecosystem sanctuaries with much of the ecosystem land preserved in a natural, undeveloped state. Ecosystems preserved as NERPs embrace Carolina bays (a unique wetland found only on the southeastern coastal plain), deciduous and coniferous forests, tall grass prairies, and deserts. Two million acres have been designated as NERPs. Much of this acreage was established as buffer zones around nuclear production and research facilities. NERP directives acknowledge the need for a comprehensive inventory of ecological resources and the long-term monitoring of regional ecosystem components and processes. Although there are no enforcement provisions associated with NERPs, NERP ecosystem sanctuaries should be regarded as environmentally sensitive natural resources, which, if adversely affected by a real property transfer, are subject to the 10 CFR 1021, Subpart D, Appendix B requirement for an environmental assessment as the minimum level of NEPA review.

3.4 Implementation of Requirements

Much of the information on whether a site contains habitats of endangered or threatened species, environments of migratory birds, Wild and Scenic Rivers designated areas, or other environmentally sensitive natural resource areas should already exist in the site's *Site Technical Information* or a site-wide NEPA document.

3.4.1 Habitats of Endangered and Threatened Species

You may submit a written request to the Regional Director of the U.S. Fish and Wildlife Service for a list of (1) listed or proposed species and (2) listed or proposed critical habitats present in the area in which the site lies [see 50 CFR 402.12(c)]. The Director has 30 days to respond to a request. In addition to a response, the Director will provide a list of candidate species being considered for listing but not yet proposed formally. If the Director advises that no (1) listed or proposed species or (2) listed or proposed critical habitats are present, no further action is necessary.

The preparation of a biological assessment is required whenever a major construction activity is planned for the site and a listed species is identified in the area. If a species identified in the area is proposed for listing, the Federal agency must confer with the U.S. Fish and Wildlife Service. The biological assessment is not required until the species proposed for listing becomes listed. A biological assessment for a proposed real property transfer evaluates the potential effects of the transfer on (1) listed and proposed species and (2) designated and proposed critical habitats. It determines whether any such species or habitats are adversely affected, and is used in deciding whether formal consultation is necessary. If the lessee or new owner rather than DOE is developing a site, DOE may require the lessee or new owner to undertake the biological assessment. The lessee or new owner and DOE may request an informal consultation with the U.S. Fish and Wildlife Service at any time concerning the potential impact of a real property transfer. The informal consultation can be held to address whether the biological assessment, if needed, should be prepared as a condition for

transferring the property. Formal consultation (as defined in 50 CFR 402.14) may not be initiated until a biological assessment is completed.

This guidance document does not address State requirements concerning habitats of endangered and threatened species because of the vast number of such requirements. However, all States have their counterparts to the U.S. Fish and Wildlife Service and follow a protocol for State-listed endangered and threatened species similar to that provided by the ESA.

3.4.2 Environments of Migratory Birds

Determine whether your site lies underneath the flyway of a migratory bird species. [General maps of flyways of migratory birds are available (e.g., National Geographic Society and *Atlas of Bird Migration*).] To verify whether there are any environments of migratory birds on your site, confer with the Regional Director of the U.S. Fish and Wildlife Service or the State counterpart to the U.S. Fish and Wildlife Service. As with informal consultation concerning impacts on habitats of endangered and threatened species, informal consultation may be held concerning impact on environments of migratory birds. The U.S. Fish and Wildlife Service attempts to provide a coordinated analysis of all environmental requirements (listed and proposed species, listed and proposed critical habitats, migratory birds, waterbody diversions and impoundments, etc.) under its jurisdiction.

3.4.3 Wild and Scenic Rivers Act Designated Areas

Over one hundred Wild and Scenic Rivers Act designated areas in the National Wild and Scenic Rivers System are listed in § 3 of the Act. (The Wild and Scenic Rivers Act can be found at 82 Stat. 906, 16 USC 1271 et seq.; this statute has been amended over 50 times since the passage of the original Act in 1968.) Section 5 of the Act (16 USC 1276) lists 91 potential additions to the National Wild and Scenic Rivers System.

You should obtain a topographic map of your site. Determine if your site falls into any of the Wild and Scenic Rivers Act designated areas in the National Wild and Scenic Rivers System or within a quarter

mile of any bank of a river listed as a potential addition to the National Wild and Scenic Rivers System.

DOE is obligated under § 10 of the Act to administer designated areas under its jurisdiction in the National Wild and Scenic Rivers System in such a way as to protect and enhance the values which caused the designated area to be included in the System without limiting public use and enjoyment. Under § 12 of the Act, DOE is obligated to eliminate or diminish water pollution in rivers in the System.

3.5 Role of Biological Resource Management Plans

Some DOE sites have biological resource management plans in place. A biological resource management plan establishes site-wide policies regarding management of wetlands, habitats of endangered and threatened species, systematic biomonitoring, wildlife disease, big game, trespass livestock, forest, and wildfire. These plans can be used to identify locations of habitats of endangered and threatened species, environments of migratory birds, Wild and Scenic Rivers Act designated areas, and other environmentally sensitive natural resources.

3.6 Relationship to Environmental Baseline Survey

Make sure that information gathered about natural resources on a facility also appears in an environmental baseline survey (see Chapter 12). Be aware that the American Standard for Testing and Materials (ASTM) E-1528-93 Standard, "Standard Practice for Environmental Site Assessments: Transaction Screen Process" and ASTM E-1527-94 Standard, "Standard Practice for Environmental Site Assessments: Phase I Environment Site Assessment Process," do not address natural resources at all. However, natural resources should be addressed because ESA applies to private as well as public properties. Violators who disturb critical habitats are subject to criminal sanctions under the provisions of the ESA. Likewise, persons (except Native Alaskans for subsistence purposes) who remove eggs or nests of migratory birds are also subject to criminal penalties under the Migratory

Bird Treaty Act regardless of whether the location is publicly or privately owned.

3.7 Relationship to NEPA Documents

If natural resources are affected by a real property transfer, pertinent information on affected natural resources should appear in an EA or EIS if either NEPA document is required (see Chapter 13). As already mentioned in § 3.3.4, if an environmentally sensitive natural resource is adversely affected, an environmental assessment is the minimum level of NEPA review required. In addition, Section 7(c)(1) of the ESA provides that biological assessments may be undertaken as part of a NEPA review. Because of the jurisdiction and expertise of the U.S. Fish and Wildlife Service in matters of protecting endangered and threatened species and migratory birds, DOE may invite the Service to serve as a cooperating agency in the NEPA process. Finally, in preparing an EA or EIS, it might be helpful to refer to EPA's "Habitat Evaluation: Guidance for the Review of Environmental Impact Assessment Documents."

3.8 Leases, Other Outgrants, and Dispositions

In general, real property containing habitats of endangered and threatened species, environments of migratory birds, and other environmentally sensitive natural resources should not be transferred unless (1) the new owner is another Federal agency, (2) the prospective use is compatible, or (3) the prospective use fulfills a compelling need. An example of a compatible prospective use is a wildlife refuge or wilderness area, either public or private. Compelling needs can be difficult to justify and must be decided on a case-by-case basis. Protection of national security, life, and safety could be compelling needs. Section 8 of the Wild and Scenic Rivers Act prohibits DOE from selling or disposing of Wild and Scenic Rivers Act designated areas.

3.9 Notice of Intention to Relinquish

If the subject real property is withdrawn land being declared excess, include the information on the

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following in the Notice of Intention to Relinquish (see § 1.6.2) to be submitted to the BLM:

- Habitats of endangered and threatened species on the property. Identify the listed and proposed species.
- Environments of migratory birds. Identify the species and their flyways.
- Wild and Scenic Rivers Act designated areas. Identify the boundaries.
- Other environmentally sensitive natural resources, such as pristine wilderness areas and special sources of water (e.g., sole-source aquifers and wellhead protection areas). Describe the resources and their boundaries.

3.10 Checklist

- ☐ Has the U.S. Fish and Wildlife Service (and State fish and wildlife counterpart) been contacted for (1) a list of listed or proposed species that are endangered or threatened, (2) a list of critical and proposed critical habitats, and (3) a list of migratory birds with flyways in the area of the property?
- ☐ Has an informal consultation been held with the U.S. Fish and Wildlife Service (and State fish and wildlife counterpart) regarding the impacts of the real property transfer on listed or proposed species, critical or proposed critical habitats, and migratory bird environments in the area?
- ☐ Has an attempt been made to identify any portions of the property that may lie in Wild and Scenic Rivers Act designated areas?
- ☐ Has an attempt been made to identify any other environmentally sensitive natural resources on the real property?
- ☐ Has information about listed or proposed threatened or endangered species and their habitats, environments of migratory birds, Wild and Scenic Rivers Act designated areas, and other environmentally sensitive natural resources been included in the environmental baseline survey?
- ☐ Has information about Federally-listed or -proposed species, State-listed species, and the habitats of threatened and endangered species; environments of migratory birds; Wild and Scenic Rivers Act designated areas; and other environmentally sensitive natural resources been included in an EA or EIS, if either document is required?
- ☐ Has information about Federally-listed or -proposed species, State-listed species, and the habitats of threatened and endangered species; environments of migratory birds; Wild and Scenic Rivers Act designated areas; and other environmentally sensitive natural resources been included in the Notice of Intention to Relinquish for excess property that is withdrawn land being returned to the public domain?
- ☐ Has consideration been given to excluding habitats of endangered and threatened species, environments of migratory birds, Wild and Scenic Rivers Act designated areas, and other environmentally sensitive natural resources from leases, other outgrants, sale, or other disposition of the real property (unless the use is compatible with protecting and preserving the natural resource)?
- ☐ If there are either (1) listed or proposed threatened or endangered species in the area or (2) listed or proposed critical habitats on the real property and the lessee or new owner is planning major construction activity, has the lessee or new owner been informed about the potential need for a biological assessment and a formal consultation with the U.S. Fish and Wildlife Service?

3.11 References

ASTM, 1994. "Standard Practice For Environmental Site Assessments: Phase I Environmental Site Assessment Process,"

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